

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

NORTHERN INDIANA PUBLIC SERVICE COMPANY

Employer/Petitioner

and

UNITED STEELWORKERS OF AMERICA, LOCAL 12775, AFL-CIO

Union

Case 13-UC-322

SUPPLEMENTAL DECISION AND ORDER

The Employer filed the instant UC petition seeking to clarify the existing bargaining unit to exclude the position of dispatcher-operators based on its contention that these employees are supervisors within the meaning of Section 2(11) of the Act. On July 31, 1997, following a hearing, a Decision and Order issued finding that the existing bargaining unit should not be clarified to exclude the dispatcher-operators. The Employer sought review of that decision from the Board. On July 26, 1999, the Board remanded the case to the Region for further consideration in light of the Board's decision in *Mississippi Power & Light*, 328 NLRB No. 146 (1999). On August 9, 1999, the undersigned Acting Regional Director ordered that the parties submit written statements of position in response to the Board's Order regarding whether the hearing should be reopened to supplement the record and/or whether either party wished to submit a further written position. In response, the Employer stated that it wished to submit a further written position. The Union did not respond to the order. On August 19, 1999 the undersigned Acting Regional Director ordered that the parties may submit further written statements of position based upon the record already developed in this case by the close of business September 2, 1999. Thereafter, the Employer submitted a statement of position, but the Union did not.

The Employer, in its original post-hearing brief, had argued that *Big Rivers Electric Corp.*, 266 NLRB 380 (1983), in which the Board found that "system supervisors" were supervisors within the meaning of the Act and should be excluded from the bargaining unit, constituted controlling precedent. Based upon numerous differences between the instant case and *Big Rivers*, however, I found that *Big Rivers* was not controlling.

The Board in *Mississippi Power & Light*, supra, explicitly overruled *Big Rivers*. It found that in prior cases, including *Big Rivers*, the Board and courts may have been swayed by the complexity of dispatchers' responsibilities and the adverse consequences resulting from faulty decisions. In contrast to these prior cases, it noted and discussed the changing face of today's workforce with increasing numbers of quasi-professional employees who use independent judgment in the performance of their own work and found that the use of critical judgment is not dispositive of the supervisory issue. The Board also drew an analogy to the approach used with cases involving charge nurses who, like the dispatchers, make complex decisions. The dispatchers in *Mississippi Power & Light* were found not to use independent judgment in the exercise of Section 2(11) supervisory indicia vis-à-vis other employees although they clearly used independent judgment in applying their own training and expertise in the performance of their jobs.

The Board's decision in *Mississippi Power & Light* only serves to bolster the rationale and findings of the original Decision and Order in the instant case. First, it explicitly overrules *Big Rivers*,

upon which the Employer relied in large part. Next, the Board endorsed the analogy to charge nurses which, likewise, was used in the original Decision and Order.¹ Also, the Board found that the use of critical judgment in the performance of work is not tantamount to the exercise of supervisory authority over other employees.

While the Employer notes numerous differences between *Mississippi Power & Light* and the instant case, I find, contrary to the Employer's contention, that the facts of this case are not so different from those in *Mississippi Power & Light* that they render it inapposite or distinguishable. Several of the differences noted by the Employer pertain to the dispatcher-operators responsibilities in writing switching orders and, in general, their role in the switching process. However, this is the type of responsibility that the Board in *Mississippi Power & Light* largely discounted in its analysis of supervisory authority. The fact that the dispatcher-operators may use their own judgment and expertise to perform their own jobs of handling a switching problem or emergency is not dispositive under the rationale of *Mississippi Power & Light* on the issue of whether they exercise supervisory authority vis-à-vis other employees.

The Employer in its supplemental brief on the remand issues also claims that the dispatcher-operators exercise supervisory authority over other employees because they contact employees and assign them to perform work in emergency situations. The record, however, shows that the dispatcher-operator merely contacts employees from the on-call list. If more employees than are on the list are needed, the field supervisor determines which employees will work. Thus, the employees whom the dispatcher-operator calls are essentially pre-approved such that the dispatcher-operators assignment is merely clerical or ministerial in nature rather than an exercise of on independent judgment. Further, the record shows that during regular hours, the dispatcher-operators contact the field employees' supervisors for approval to move employees from regular assignments to emergency tasks. The Employer further contends that the dispatcher-operators in the performance of their job functions can hold employees to the completion of a project or emergencies even if that entails overtime for the employees. The record, however, indicates that the circumstances in which a field supervisor is not first consulted are cases of extreme emergency or where the employees are in the middle of a switching operation. Thus, it appears that the dispatcher-operators are not routinely assigning employees overtime. Alternately, when they hold employees over, it appears that there is no other viable option under the circumstances.

Next, the Employer argues that the dispatcher-operators responsibly direct the work of the field employees. I find, however, that the relationship between the dispatch-operators and field employees is a collaborative relationship rather than a supervisor/employee relationship. The main difference between the dispatcher-operators and the field employees is that the former have greater expertise and formulate plans which the latter execute. This is not equivalent to directing the field employees. The dispatcher-operators merely devise or administer a plan to accomplish the task at hand. The record shows and I previously found that the field employees report to separate field supervisors in implementing these plans. The Employer also notes that if the dispatcher-operator believes that the field employees are not properly executing the switching orders, he or she may stop the entire process. Again, this relates to the dispatcher-operator's use of greater expertise to ensure that the plan is accomplished properly rather than exercising authority over employees. Indeed, the dispatcher-operators do not discipline employees for incorrectly performing the operation, but instead, halt the process which reflects their critical judgment towards the work itself rather than to other employees. The Employer emphasizes that field employees

¹ The Board cited, at slip op. 6, *Providence Hospital*, 320 NLRB 717 (1996), enf. sub nom *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), which was also cited in the Decision and Order in the instant case.

must report back to the dispatcher-operator that steps in the switching process have been completed before proceeding to the next step. This is not an example of the dispatcher-operator using independent judgment in the assignment or direction of work. Instead, the dispatcher-operator and field employees are collaborating and working together with the dispatcher-operator supplying his/her expertise and knowledge to ensure that the work is performed to specifications before forging ahead. In sum, a chain of action or functional integration exists between the dispatcher-operators and the field employees which is not commensurate with a supervisory hierarchy.

Moreover, even apart from *Mississippi Power & Light*, the record evidence in the instant case (as discussed above and in the original Decision and Order) simply fails to demonstrate that the dispatcher-operators use independent judgment in the direction of other employees or in the exercise of any supervisory indicia. Accordingly, I shall clarify the unit to include the dispatcher-operators.²

ORDER

IT IS HEREBY ORDERED that the existing bargaining unit be clarified to include the dispatcher-operators.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099 14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by September 24, 1999.

DATED September 10, 1999 at Chicago, Illinois.

/s/ Harvey A. Roth

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177-8520-2400; 177-8520-4700;
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² In the prior Decision and Order, I stated that the unit should not be clarified to exclude the dispatch-operators. In *Mississippi Power & Light*, supra at slip op. 11 fn. 34, the Board noted that where the petition raises timely and appropriate unit clarification issues as to whether certain classification should be excluded, it is proper to clarify the unit to include the disputed positions rather than to dismiss the petition.